

1 Mildred K. O'Linn (State Bar No. 159055)
missy.olinn@manningkass.com

2 Lynn L. Carpenter (State Bar No. 310011)
lynn.carpenter@manningkass.com

3 Maya R. Sorensen (State Bar No. 250722)
maya.sorensen@maningkass.com

4 **MANNING & KASS**
ELLROD, RAMIREZ, TRESTER LLP
5 801 S. Figueroa St, 15th Floor
Los Angeles, California 90017-3012
6 Telephone: (213) 624-6900
Facsimile: (213) 624-6999

7 Attorneys for Defendants, CITY OF
8 FRESNO, UNKNOWN LAW
ENFORCEMENT OFFICERS, and
9 FORMER POLICE CHIEF PACO
BALDERRAMA

11 **UNITED STATES DISTRICT COURT**
12 **EASTERN DISTRICT OF CALIFORNIA**

14 MARTHA ZEPEDA OLIVARES,
15 individually and on behalf of the
ESTATE OF MAXIMILIANO SOSA,
16 JR.; MAXIMILIANO SOSA, SR,

17 Plaintiffs,

18 v.

19 CITY OF FRESNO; UNKNOWN
LAW ENFORCEMENT OFFICERS,
20 POLICE CHIEF PACO
BALDERRAMA and DOES 1-30,

21 Defendants.

Case No. 1:23-cv-01575-JLT-SAB
Dist. Court Judge Jennifer L. Thurston
Magistrate Judge Barbara A. McAuliffe

**NOTICE OF MOTION AND
MOTION BY DEFENDANTS TO
DISMISS PORTIONS OF
PLAINTIFF'S FIRST AMENDED
COMPLAINT**

*[Filed concurrently with Proposed
Order]*

Hearing Date: October 11, 2024
Time: 9:00 a.m.
Courtroom: 4

Action Filed: 02/23/2024
Trial Date: Not Yet Set

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TO PLAINTIFF AND HIS ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that at 9:00 a.m., on October 11, 2024, in Courtroom 4 (7th Floor), located at the United States District Court, Eastern District of California, 2500 Tulare Street, Fresno, California 93721; pursuant to Federal Rules of Civil Procedure 7, 11, and 12, and United States District Court, Eastern District of California Local Rule 230, as well as the applicable Orders of the Court; Defendants CITY OF FRESNO, UNKNOWN LAW ENFORCEMENT OFFICERS, and FORMER POLICE CHIEF PACO BALDERRAMA (collectively “defendants”), will move this Court for an Order dismissing, without leave to amend, a portion of plaintiffs’ First Amended Complaint (FAC), which was filed on February 23, 2024 [Doc. 26] as follows:

1. Plaintiffs’ Fifth claim for violation of the Americans with Disabilities Act and Rehabilitation Act (“ADA”) in its entirety, for failure to state a claim upon which relief can be granted;

2. In the alternative, defendants hereby request that this Honorable Court dismiss plaintiffs’ fifth cause of action claims with leave to amend.

This motion is made on the grounds that plaintiffs fail to state a valid ADA claim.

This motion is made pursuant to Federal Rule of Civil Procedure 12(b)(6), and is based upon this notice of motion and the attached memorandum of points and authorities filed and served herewith, the proposed order lodged and served concurrently, the papers and records on file in this action, and upon such additional evidence and arguments as may be properly before this Court at the time of the hearing on this motion.

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1 **NOTICE ON CONFERENCE OF COUNSEL PER LOCAL RULE.**

2 This motion is made after the defendants attempted resolution by conference of
3 counsel as required by this Court's standing orders [Doc. 5-1]. Prior to filing this
4 motion, defendants' counsel provided plaintiffs' counsel with a detailed meet and
5 confer letter first on March 4, 2024, setting forth defendants' position as to plaintiffs'
6 lack of standing to file the FAC. On March 5, 2024, the parties agreed to stipulate to
7 a postponement of the scheduling conference and defendants' response date to allow
8 time for decedent's wife and children to enter the case. The responsive pleading date
9 was then continued by this Court to September 6, 2024. [Doc. 34.]

10 In anticipation of defendants' responsive pleading due date, defendants reached
11 out to plaintiffs on August 19, 2024 to discuss the fact that the real successors in
12 interest were not, on that date, in the case. The rightful heirs had not filed a complaint
13 yet. Defendants also raised concerns about plaintiffs' ADA claim. Plaintiffs did not
14 respond. On August 26, 2024, defendants sent meet and confer correspondence setting
15 forth defendants' position as to the issues and deficiencies with regard to plaintiffs'
16 ADA claim. On September 3, 2024, defendants reached out to plaintiffs via phone
17 and email to further discuss the instant motion to dismiss. As of the filing of this
18 motion, plaintiffs have not responded to defendants' numerous requests to meet and
19 confer.

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1 DATED: September 6, 2024

**MANNING & KASS
ELLROD, RAMIREZ, TRESTER LLP**

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4 By: /s/ Mildred K. O'Linn

Mildred K. O'Linn, Esq.

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7 Attorneys for Defendants, CITY OF

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ATTORNEYS AT LAW

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs’ First Amended Complaint (“FAC”) alleges that on November 3, 2023, Defendants City of Fresno (“CITY”), Unknown Law Enforcement Officers and [Former] Police Chief Paco Balderrama (“Chief Balderrama”) (collectively “Defendants”) violated various rights under federal law in connection with the alleged use of excessive force against decedent, Maximiliano Sosa (“decedent”).

However, plaintiffs’ fifth cause of action for violation of the Americans with Disabilities Act and Rehabilitation Act (“ADA”) fails to state a claim upon which relief can be granted. Accordingly, defendants request that the Court dismiss the fifth cause of action for failing to state a claim.

II. SUMMARY OF ARGUMENT

Plaintiffs’ fifth cause of action under the ADA fails to state a claim because plaintiffs neither allege that decedent had a “specific, recognized, mental or physical illness” nor that he had any record of such impairment. Moreover, plaintiffs’ FAC neither alleges that the officers’ used force on decedent *because* of his alleged disability, nor does the complaint allege that the officers even knew of any alleged disability. The Court should therefore grant defendants’ motion to dismiss plaintiffs’ ADA claim.

III. STANDARD FOR MOTION TO DISMISS

Under Federal Rule of Civil Procedure 12(b)(6), a claim may be dismissed because of the plaintiff’s “failure to state a claim upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6). A dismissal under Rule 12(b)(6) may be based on the lack of a cognizable legal theory or on the absence of sufficient facts alleged under a cognizable legal theory. *Johnson v. Riverside Healthcare Sys.*, 534 F.3d 1116, 1121 (9th Cir. 2008); *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001).

In reviewing a complaint under Rule 12(b)(6), all allegations of material fact are taken as true and construed in the light most favorable to the non-moving party.

1 *Marceau v. Blackfeet Hous. Auth.*, 540 F.3d 916, 919 (9th Cir. 2008); *Vignolo v.*
 2 *Miller*, 120 F.3d 1075, 1077 (9th Cir. 1999). But the Court is *not* required “to accept
 3 as true allegations that are merely conclusory, unwarranted deductions of fact, or
 4 unreasonable inferences.” *In re Gilead Scic. Sec. Litig.*, 536 F.3d 1049, 1056-1057
 5 (9th Cir. 2008); *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001).
 6 As the Supreme Court has explained:

7 While a complaint attacked by a Rule 12(b)(6) motion to
 8 dismiss does not need detailed factual allegations, a
 9 plaintiff's obligation to provide the 'grounds' of his
 10 'entitlement to relief' requires more than labels and
 11 conclusions, and a formulaic recitation of the elements of a
 cause of action will not do. Factual allegations must be
 enough to raise a right to relief *above the speculative level*,
 on the assumption that all the allegations in the complaint
 are true (even if doubtful in fact).

12 *Bell Atlantic Corp. v. Twombly*, 555 U.S. 544, 555 (2007) (emphasis added). Thus,
 13 to avoid a Rule 12(b)(6) dismissal, “a complaint must contain sufficient factual
 14 matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’
 15 [Citation.]” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). “A claim has facial
 16 plausibility when the plaintiff pleads factual content that allows the court to draw the
 17 reasonable inference that the defendant is liable for the misconduct alleged.
 18 [Citation.]” *Id.* “The plausibility standard is not akin to a ‘probability requirement,’
 19 but it asks for more than a sheer possibility that a defendant has acted unlawfully.”
 20 *Id.* “[W]here the well pleaded facts do not permit the court to infer more than the
 21 mere possibility of misconduct, the complaint has alleged, but it has not ‘show[n],’
 22 ‘that the pleader is entitled to relief.’ [Citation.]” *Id.* at 679.

23 If the court finds that a complaint should be dismissed for failure to state a
 24 claim, the Court has discretion to dismiss the complaint with *or* without leave to
 25 amend. *See, e.g., Lopez v. Smith*, 203 F.3d 1122, 1126-31 (9th Cir. 2000); *accord*
 26 *Machul v. City of Long Beach*, 2015 U.S. Dist. LEXIS 52472, *6 (C.D. Cal. February
 27 20, 2015). Leave to amend should be granted if it appears plausible that the defects
 28 in the complaint could be corrected. Thus, if a Rule 12(b)(6) motion to dismiss is

1 granted, “[the] district court should grant leave to amend even if no request to amend
 2 the pleading was made, unless it determines that the pleading could not possibly be
 3 cured by the allegation of other facts.” *Doe v. United States*, 58 F.3d 494, 497 (9th
 4 Cir. 1995). However, if after careful review it becomes clear that a complaint cannot
 5 be cured by amendment, the court may dismiss the complaint without leave to amend.
 6 *See Chaset v. Fleer/Skybox Int’l*, 300 F.3d 1083, 1087-1088 (9th Cir. 2002); *Machul*,
 7 2015 U.S. Dist. LEXIS 52472 at *6. In other words, *leave to amend need not be*
 8 *granted when amendment would be futile*. *Gompper v. VISX, Inc.*, 298 F.3d 893,
 9 898 (9th Cir. 2002) (emphasis added).

10 Here, plaintiffs have not shown a willingness to amend the complaint and there
 11 is no evidence that amending the complaint could cure the deficiencies. Accordingly,
 12 defendants request that the referenced portions of plaintiffs’ FAC be dismissed
 13 without leave to amend.

14 **IV. PLAINTIFFS’ FIFTH CAUSE OF ACTION FOR VIOLATING THE**
 15 **AMERICANS WITH DISABILITIES ACT AND THE**
 16 **REHABILITATION ACT FAILS TO STATE A CLAIM UPON**
 17 **WHICH RELIEF CAN BE GRANTED.**

18 Plaintiffs allege that the City of Fresno denied Maximiliano Sosa the benefits
 19 of Title II ADA services, programs, and/or activities and subjected Mr. Sosa to
 20 unlawful discrimination by failing to provide reasonable accommodations for his
 21 disabilities. However, plaintiffs’ Complaint fails to state a claim upon which relief
 22 can be granted.

23 In order to state a claim under Title II of the ADA, a plaintiff must prove that:
 24 (1) he or she is an individual with a disability; (2) he or she is otherwise qualified to
 25 participate in or receive the benefit of a public entity’s services, programs or
 26 activities; (3) that he or she was either excluded from participation in or denied the
 27 benefits of some public entity’s services, programs or activities, or was otherwise
 28 discriminated against by a public entity; and (4) the exclusion, denial of benefits or

1 discrimination was by reason of the plaintiff's disability. *O'Guinn v. Lovelock*
 2 *Corr. Ctr.*, 502 F.3d 1056, 1060 (9th Cir. 2007).

3 According to the ADA, an individual is disabled if that individual "(1) has a
 4 physical or mental impairment that substantially limits one or more of the
 5 individual's major life activities; (2) has a record of such an impairment; or (3) is
 6 regarded as having such an impairment." *Deppe v. United States*, 217 F.3d 1262,
 7 1265 (9th Cir. 2000). The courts require that plaintiff allege "that [the Decedent]
 8 suffered from a specific, recognized, mental or physical illness." *Bresaz v. Cnty. of*
 9 *Santa Clara*, 136 F. Supp. 3d. 1125, 1136 (N.D. Cal. 2015).

10 Here, the complaint merely asserts that "Max had developed emotional
 11 distress and was having a mental health episode that resulted in his being disabled
 12 for the purposes of federal and state law." This does not allege a "specific,
 13 recognized, mental or physical illness," but instead vaguely states that Mr. Sosa had
 14 emotional distress with a reference to one mental health episode at an unspecified
 15 time. Moreover, the complaint fails to allege that Mr. Sosa had any record of such
 16 impairment or that anyone regarded him as having such an impairment.

17 Element three of Title II discrimination requires plaintiffs to plead facts that
 18 plausibly indicate that the discrimination was "by reason of his disability." 42
 19 U.S.C. § 12132. Plaintiffs' complaint does not allege that the officers' used force on
 20 Mr. Sosa because he was disabled, or that the officers knew of his alleged mental
 21 illness. "To find that a refusal to reasonably accommodate a person with a
 22 qualifying disability was 'by reason of' the disability, plaintiff needs to plead that
 23 his known disability was a motivating factor in the non-accommodation of his
 24 arrest, or that the deputies knew of and were motivated by his investigation with
 25 ADA compliance." *See Avila v. City of Visalia*, 2010 U.S. Dist. LEXIS 115935,
 26 2010 WL 4483393, at 3 (E.D. Cal. Nov. 1, 2010). Here, plaintiffs have pled no facts
 27 to suggest that the officers knew that Mr. Sosa had a mental illness, let alone that it
 28 was a "motivating factor" in the officers' use of force. For this reason, plaintiffs'

1 cause of action for violation of the Americans with Disabilities Act and the
2 Rehabilitation Act should be dismissed for failure to state a viable claim.

3 **V. CONCLUSION**

4 For all of the foregoing reasons, the honorable Court should GRANT the instant
5 motion and dismiss Plaintiff's First Amended Complaint without leave to amend. In
6 the alternative, the Court should dismiss claims to the fullest extent the Court deems
7 appropriate.

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9 DATED: September 6, 2024

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11
12 By: /s/ Mildred K. O'Linn

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